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In the Supreme Court of the United States

OCTOBER TERM, 1963

NO.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of James L. Saxon, Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. Judgment was entered on August 14, 1963, and became final on October 17, 1963.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 323 F. 2d 290. The opinion of the district court is reported at 211 F. Supp. 576.

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[1] Whitney National Bank in Jefferson Parish has also filed a petition for a writ of certiorari from a judgment entered on the same date, arising out of the same transaction, now pending as No. 763.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 24) was entered on August 14, 1963. Timely petitions for rehearing *en banc* were denied on October 17, 1963 (*id.*, pp. 25–26). By an order dated January 9, 1964, the Chief Justice extended the time for filing this petition to and including January 30, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision of the Federal Reserve Board, which approved a plan for the acquisition and operation of a new national bank by a bank holding company, pursuant to the Bank Holding Company Act of 1956, may later be attacked by competitor banks in a separate suit to enjoin the Comptroller of the Currency from authorizing the opening of the new national bank.

2. Whether the opening and operation of a separately chartered national bank by a bank holding company may be enjoined on the ground that the bank is an unlawful branch of another bank.[2]

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix B, *infra*, pp. 27–34.

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[2] If respondents seek to defend the judgment of the court of appeals on grounds not reached by that court, a third question may be presented: whether a state prohibition on the opening of national banks owned by bank holding companies is in conflict with the provisions of the National Bank Act.

STATEMENT

1: *The Underlying Facts.* The Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank[3] with its main office and numerous branches in the City of New Orleans,[4] which is coextensive with the Parish of New Orleans.[4] It is the largest bank in Louisiana. With the expansion of the New Orleans metropolitan area beyond the city limits, the portion of Jefferson Parish adjoining New Orleans on the east bank of the Mississippi River ("East Jefferson Parish") has had a rapid industrial and residential expansion. Prospects for continued growth are excellent, and the need for further banking services is evident (Op. 38; J.A. 67, 70, 100–101, 426).[5]

Many of the residents of East Jefferson Parish have been customers of Whitney-New Orleans and other banks in the city. However, state law (La. R.S. § 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36). The downtown New Orleans banks have been unable, therefore, to follow their customers to East Jefferson Parish by establishing branches there.

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[3] A national bank is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, *et seq.*

[4] A parish in Louisiana is comparable to a county in other States.

[5] "Op.—" references are to the opinion of the court of appeals printed as an appendix to the petition of Whitney National Bank in Jefferson Parish, No. 763, this Term. "J.A.—" references are to the Joint Appendix printed and filed in the court of appeals.

In 1955, the majority stockholders of the National Bank of Commerce in New Orleans, Whitney-New Orleans' largest competitor, opened a separately chartered affiliate bank in East Jefferson Parish, the National Bank of Commerce in Jefferson Parish. The two banks were controlled by the same stockholders, with an interlocking set of directors and executive officers (J.A. 65, 116). Another of Whitney-New Orleans' principal competitors also established a separately chartered affiliate there (J.A. 42, 90, 116).

Faced with this competition and the statutory prohibition of branch offices in other parishes, the management of Whitney-New Orleans considered the two possibilities for opening related banking facilities in Jefferson Parish: (1) the establishment of an affiliate, similar to those of its competitors; (2) the establishment of a bank-holding company, which would in turn establish a separately chartered bank in Jefferson Parish (J.A. 65). In order to assure a continuity of relationship between the new and old banks, and to avoid any conflict of interest in transactions with the new bank, the Whitney management decided to adopt the holding company approach (Op. 39–41; J.A. 69–70, 71–72).

A five-step program was developed. In brief,[6] the program involved the organization and establishment of a holding company (Whitney Holding Corpora-

[6] The steps of the program are set forth at Op. 41, and are fully detailed in a letter to Whitney stockholders (J.A. 112–115).

tion), the placing of the ownership of Whitney-New Orleans in the holding company (through a merger with Crescent City National Bank, which was to be created for that purpose) and the placing of the ownership of the holding company in the hands of the original owners of the bank. Finally, with the proceeds of a dividend from Whitney-New Orleans' undivided profits, the holding company was to purchase the stock (except for directors' qualifying shares) of a newly chartered bank in Jefferson Parish (Op. 41). After due notice shareholders representing over 88 percent of the stock of Whitney-New Orleans approved the plan. The program also required the approval of the Comptroller of the Currency under the National Bank Act for the chartering and opening of the new bank,[7] and the approval of the Board of Governors of the Federal Reserve System (hereafter, the "Federal Reserve Board") under the Bank Holding Company Act of 1956 for permission for the holding company to acquire and operate the new bank in Jefferson Parish.

2. *Administrative Proceedings.* On June 28, 1961, Whitney submitted its entire program to the Comptroller of the Currency. In accordance with usual practice, his examiners carried out a full field investigation over a period of several months and, as was customary, communicated with competitor banks to obtain their views. By letter of October 3, 1961, the

[7] His approval was also required for the chartering of Crescent City National Bank and its consolidation with Whitney-New Orleans, which are steps in the program.

Comptroller gave his preliminary approval to the program, subject to the Federal Reserve Board's approval, under the Bank Holding Company Act, of the acquisition by Whitney Holding Corporation of the stock of Whitney-New Orleans and of the new bank in Jefferson Parish (J.A. 46–47).

On July 14, 1961, Whitney Holding Corporation filed an application with the Federal Reserve Board for permission to become a registered bank holding company, under the Bank Holding Company Act of 1956, by acquiring substantially all the stock of Whitney-New Orleans and of the new bank, which was to be called Whitney National Bank in Jefferson Parish (hereafter, "Whitney-Jefferson") (J.A. 58). Pursuant to the provisions of Section 3(b) of the Bank Holding Company Act (12 U.S.C. 1842(b), *infra* p. 31), the Board requested the Comptroller's advice as to whether or not it should approve the Whitney application. The Comptroller recommended the Board's approval of the application, by letter of October 11, 1961 (J.A. 44, 166–167). Thereafter, the Federal Reserve Board ordered that a public proceeding be held before it on January 17, 1962, and gave public notice of the hearing.

At the hearing before the seven Governors of the Board, testimony and argument were submitted on behalf of the application by Whitney's president and attorney. Testimony and argument in opposition were also submitted, but none of the present respondents appeared at the hearing or made their views known to the Board prior to its decision (J.A. 61–95). By

order and opinion dated May 3, 1962, the Board approved the Whitney application by a vote of 6 to 1 (J.S. 97–98, 99–111), but provided that the acquisitions should not be consummated sooner than seven days after that date. No petition for rehearing or reconsideration was filed within that time. However, on June 13, 1962, two of the present respondents filed with the Federal Reserve Board a petition for reconsideration of its decision approving the Whitney application. On June 25, 1962, the Board denied the petition as untimely and as having no substantial merit (J.A. 167–169).

3. *Judicial Proceedings In the Fifth Circuit.* These two respondents then petitioned the United States Court of Appeals for the Fifth Circuit for judicial review of the Board's decision under section 9 of the Bank Holding Company Act, contending that Whitney-Jefferson would be merely a branch of Whitney-New Orleans. The Fifth Circuit has not as yet taken any action on this petition.

4. *Judicial Proceedings Against the Comptroller.* By May 25, 1962, Whitney-Jefferson had been organized and recognized by the Comptroller as a national bank under the terms of the National Bank Act. The original stockholders of Whitney-New Orleans then owned Whitney Holding Corporation, which in turn had acquired the stock (except for directors' qualifying shares) of Whitney-New Orleans and Whitney-Jefferson. All that remained to be done to consummate the Whitney proposal was for the Comptroller to issue a certificate of authority, under the National

Bank Act (12 U.S.C. 27), to permit Whitney-Jefferson to commence the business of banking (J.A. 115–116).

On June 9, 1962, three State-chartered banks brought this action to restrain the Comptroller from issuing the certificate of authority which would permit Whitney-Jefferson to open for business. Standing was bottomed upon the injury that competition from Whitney-Jefferson might cause them (J.A. 16–17).[8] The gravamen of the complaint was that Whitney-Jefferson was a branch bank within the meaning and scope of the Banking Act of 1933 (12 U.S.C. 36, *infra*, pp. 28–29), and that its establishment was therefore prohibited by law (J.A. 6–20). An additional contention was advanced later. This was based on the fact that, while the complaint was pending in the district court, the Louisiana legislature enacted Louisiana Act No. 275 of 1962, which made it unlawful thereafter for any bank owned or controlled by a bank holding company to open for business whether or not it had received its charter or certificate to engage in the banking business (*infra*, p. 34). The bill was signed by the Governor on July 10, 1962, as "emergency legislation," to become effective immediately (Op. 43).

The case was submitted to the district court on cross-motions for summary judgment which relied up-

[8] Respondent banks are State-chartered competitors or potential competitors of the Whitney banks, none of which have their offices in Jefferson Parish. One of the three original plaintiffs, which was located in Jefferson Parish, voluntarily withdrew as a party plaintiff. Respondents Bank of Louisana in New Orleans and the State Bank Commissioner later intervened as parties plaintiff (see Op. 41–42, n. 6). Whitney-Jefferson intervened as a party defendant.

on the administrative record and opinions of the Federal Reserve Board, affidavits, and other documents. The district court granted plaintiff's motion for summary judgment and denied defendants' (J.A. 437). In a short memorandum opinion the court ruled the plaintiffs had standing to invoke its jurisdiction; that the Bank Holding Company Act of 1956 reserved to or conferred upon the States authority to prohibit the operation within their borders of banks owned by holding companies, including national banks; and that Louisiana Act No. 275 of 1962 deprived the Comptroller of the Currency of his authority under the National Bank Act to issue a certificate of authority to the Whitney National Bank in Jefferson Parish (211 F. Supp. 576). The court found it unnecessary to rule specifically upon the theory that Whitney–Jefferson was merely a branch of Whitney–New Orleans (J.A. 438).

Both the Comptroller and Whitney-Jefferson appealed. In addition to his arguments on the merits, the Comptroller again urged that the district court lacked jurisdiction because competitor banks do not have standing to challenge the opening of a new national bank and that such banks have an adequate administrative remedy before the Federal Reserve Board with a right to judicial review of the Board's decision. Both appellants called the court's attention to the review proceedings which were then pending in the Fifth Circuit, and the Comptroller argued that respondents had not exhausted their remedies under the Bank Holding Company Act.

The court of appeals held that the district court had jurisdiction. It ruled that bank charters are the equivalent of semi-exclusive franchises and confer upon their holders a right to be free from the competition of a branch whose operation violates the branch-banking provisions of the Banking Act of 1933, 12 U.S.C. 36. On the merits the court held that Whitney–Jefferson was a branch of Whitney-New Orleans and that the operation of branches, outside of New Orleans Parish, was forbidden by the Banking Act of 1933, 12 U.S.C. 36. It, therefore, found it unnecessary to rule upon the applicability of Louisiana Act 275 of 1962 to national banks.

The Comptroller and Whitney-Jefferson filed timely petitions for rehearing *en banc*. The Comptroller again contended that the district court lacked jurisdiction over the controversy. To his previous arguments he added the contention that the decision of the court of appeals, which was based upon a ground which could and should have been presented to the Board, constituted an impermissible collateral attack upon the Board's decision. The petitions for rehearing were denied without opinion on October 17, 1963.

REASONS FOR GRANTING THE WRIT

The court below has held that competitor banks can litigate, in a district court suit to enjoin the Comptroller of the Currency from authorizing the opening of a new national bank, objections that should have been made the subject of an administrative determination by the Federal Reserve Board, subject to statu-

tory review in the appropriate court of appeals. It has further held that a separately chartered subsidiary of a bank-holding company is subject to the restrictions, imposed by the Banking Act of 1933, upon the location of branch offices of a single bank. These holdings, we believe, are both erroneous and of substantial and continuing importance to the banking industry and to the federal agencies charged with regulating that industry.

1. *Jurisdiction of the district court.* The Bank Holding Company Act requires the approval of the Federal Reserve Board if a bank holding company is to acquire a new subsidiary. 12 U.S.C. 1842, *infra*, pp. 30–32. The Act provides for a full administrative proceeding at which competitor banks may express their objections and the views of the Comptroller of the Currency are obtained, and for judicial review of the Board's decision by a court of appeals which must accept the Board's findings of fact if they are supported by substantial evidence. The permission of the Comptroller of the Currency is necessary under the National Bank Act in order to open a new national bank. 12 U.S.C. 27, *infra*, p. 28. The latter statute does not provide for an administrative hearing or judicial review, and the Comptroller's decisions are made informally, without an administrative record. When a bank holding company intends to acquire a subsidiary which is to be opened as a new national bank, the transaction has two aspects and requires the approval both of the Federal Reserve Board (for the acquisition) and of the Comptroller of the Currency (for the opening).

The jurisdictional question presented by this case is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the transaction upon which the Board is authorized to pass or may attack the transaction, after the Comptroller has recommended its approval and the Board has approved it, by a suit for an injunction brought against the Comptroller of the Currency. It is our contention that persons opposing the acquisition and operation of the new subsidiary must present to the Federal Reserve Board objections which can be raised before that agency, and that they are bound by its decision subject only to review in the reviewing court of appeals.

A. The Bank Holding Company Act of 1956 provides an administrative tribunal where competitor banks may raise their objections to the effects of the combination of banking resources and operations which results from the acquisition and operation of either a new or an existing bank by a bank-holding company. Consistent with general principles of primary jurisdiction and exhaustion of legal remedies, the Act manifests a purpose of making these statutory proceedings before the Federal Reserve Board, rather than a district court suit for an injunction, the proper and exclusive forum for all such objections. This result follows automatically in the case of the most common type of expansion of a bank-holding-company system—when a holding company acquires an operating national or state-chartered bank. In this event, the acquired bank already possesses all the certificates

necessary for operation, and there is thus no occasion on which the Comptroller of the Currency (or his state counterpart) can be enjoined by a district court from allowing the bank-holding company's subsidiary to open and conduct its business.

The same result is intended when a bank-holding company acquires a newly organized subsidiary. The Bank Holding Company Act makes the Comptroller of the Currency (or the equivalent state supervisory authority) a necessary participant in the administrative proceedings before the Federal Reserve Board, so that at this stage the views of each of these regulatory agencies can be considered together and resolved in the light of the evidence and arguments presented by all interested parties. Where, in a case such as this, the Federal Reserve Board has reached a determination consistent with the recommendation of the only other regulatory agency, the Comptroller of the Currency, after giving all interested parties full notice and an opportunity for hearing, that determination is meant to be final and not subject to later attacks by a suit for an injunction in a district court against the Comptroller.

This conclusion is confirmed by contrasting the statutory scheme of administrative proceeding and judicial review established for decisions of the Federal Reserve Board with the lack of any such provisions for decisions of the Comptroller. There is no statutory provision for an administrative hearing by the Comptroller of the Currency. His decisions are made informally and *ex parte*, unlike decisions of the Fed-

eral Reserve Board, which are to be made upon a record and with the participation of all interested parties, including competitor banks.[9] The federal statutes further define the forum and venue for judicial review of the decisions of the Board. There is, in contrast, no statutory provision for judicial review of decisions of the Comptroller of the Currency. Indeed, there is grave doubt as to whether the potential effect of increased competition upon another bank gives the latter standing to seek an injunction against the Comptroller. Thus, prior to this case, the courts have never entertained suits by competitor banks to enjoin the issuance by the Comptroller of a certificate to commence business as a new national bank[10] under the National Bank Act. Even if bank charters were to be equated with the franchises of public utilities, competitor banks would not appear to have sufficient legal interest, absent statutory authorization, to invoke the jurisdiction of a federal court to challenge administrative action which simply increases the degree of competition. *Tennessee Power Company* v. *T.V.A.*, 306 U.S. 118, 137, 144; see *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476–477.

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[9] Another circuit has held, improperly we think, that banks have standing to challenge the establishment of new branches. *Gidney* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830.

[10] The court of appeals believed this Court's decision in *Frost* v. *Corporation Commission*, 278 U.S. 515, "to be dispositive of the question of standing" (Op. p. 52). In *Tennessee Power Co.* v. *T.V.A.*, *supra*, this Court found *Frost* to be "inapplicable" to situations not involving discrimination forbidden by the Fourteenth Amendment. 306 U.S. at 143.

B. It follows that the integrated scheme of federal banking regulation requires that all issues which can be raised and determined as part of the established administrative proceedings before the Federal Reserve Board should be raised before that Board. Despite what may have been some suggestion of doubt by the Board itself (Op. 56, n. 12),[11] we believe it clear that the issue decided by the court below should have been litigated before the Federal Reserve Board in the first instance, rather than before a district court. By the same token, it was subject to review by the Court of Appeals for the Fifth Circuit rather than by the Court of Appeals for the District of Columbia Circuit. If a separately chartered bank which is to be owned by a bank-holding company could be subjected to the territorial limitations imposed upon branch offices of a single bank (we believe that Congress intended that the two kinds of banking should never be treated as one, see *infra*, pp. 17–23), the determination as to whether a particular bank should be so treated would depend upon the relationship between that bank, the holding company, and the holding company's other subsidiaries, considered in the light of the policy considerations embodied in the Bank Hold-

[11] In denying respondents' request for reconsideration on the dual grounds that it was both untimely and without merit, the Board alluded to the fact that the statute making the geographical limitations of state law applicable to branch banks (12 U.S.C. 36) is administered by the Comptroller. The Board may have been referring to the fact that the Comptroller had already approved the lawfulness of the proposed transaction in his recommendations to the Board. See *supra*, p. 6.

ing Company Act. It is far more appropriate that this determination be made after full administrative proceedings by the agency charged with regulating bank-holding companies, the Federal Reserve Board, than that it be made by a district court in a suit against the Comptroller. The suit against the Comptroller in the present case is, in short, an impermissible collateral attack upon the Board's decision by persons who have not pursued to their conclusion the remedies specified by Congress.

C. Finally, the ruling of the court of appeals will have consequences of continuing importance. Since venue for a suit against an officer of the United States such as the Comptroller of the Currency lies in the District of Columbia (28 U.S.C. (Supp. IV) 1391 (e)), the decision below will subject a proposed acquisition of a new national bank by a bank holding company to attack in at least two forums, with different records created in each and with different standards for judicial review. The consequent waste of judicial effort and disruption of orderly processes is a matter of significant concern both to private parties and to the federal regulatory agencies.

The undesirability of multiple forms of administrative and judicial review of the same banking transaction is obvious. If competitor banks may raise the same challenge to a holding company's acquisition and operation of a new subsidiary before both the Federal Reserve Board and a district court (in a suit against the Comptroller of the Currency), the governmental and private parties will be called upon to incur the

unwarranted expense and burden of repetitious litigation. Beyond this, there is the likelihood of unseemly conflicts among the federal courts and administrative agencies engaged in reviewing the transaction. Thus, Section 9 of the Bank Holding Company Act provides for review of the Board's decision in a court of appeals where the Board's findings must be accepted if supported by substantial evidence. 12 U.S.C. 1848. Inconsistent findings might be made by the district court in a suit to enjoin the Comptroller of the Currency, for the court would presumably find the facts in a trial *de novo,* being bound neither by the findings of the Board (whose decision the district court is not reviewing) nor by the findings of the Comptroller, who has not yet finally acted when the suit for an injunction is brought, and who, in any event, decides informally and without an administrative record. The possibility of a conflict on questions of law between one court of appeals reviewing the decision of the Federal Reserve Board and another reviewing the decision of the district court is no less real.

2. *The merits.* The holding of the court below that separately chartered national banks which are subsidiaries of a bank-holding company are subject to the territorial restrictions imposed on branch offices by the Banking Act of 1933 (*infra,* pp. 28–29) is also erroneous and of substantial continuing importance to the banking industry. There are similarities between the operation of one bank with several branches and the operation of several separately chartered banks owned or controlled by a bank-holding company. Each form

of operation permits common ownership and control of multiple banking offices.[12] Indeed, the organization and operation of bank-holding companies is often motivated by a desire to avoid some of the restrictions against branch banking.[13] But there are also very substantial differences between the two forms of operation, arising in large part from the separate schemes of federal regulation. Because of these differences, Congress plainly decided in 1933, and again in 1956, that bank-holding companies and their separately chartered subsidiaries should not be subject to the territorial restrictions imposed on the branches of a single national bank. The court of appeals erred in disregarding that fundamental Congressional decision.

A. Even if Congress had not twice rejected the imposition of branch-banking restrictions on separately chartered national banks which are subsidiaries of a bank-holding company, the great difference in the two methods of operations would counsel against application to such subsidiaries of restrictions intended only for branches of a single bank. The National Bank

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[12] For studies on branch banking, and multiple-unit banking through separately chartered banks, their differences and similarities, see, *e.g.*, Cartinhour, *Branch, Group and Chain Banking* (1931); Chapman, *Concentration of Banking* (1934); Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975 (1931); Willit, *Selected Articles on Chain, Group and Branch Banking* (1930); Chapman and Westerfield, *Branch Banking* (1942); Lamb, *Group Banking* (1961).

[13] See Fischer, *Bank Holding Companies* (1961), pp. 1, 23, 138; Comptroller of the Currency, *Annual Report*, 1929, pp. 4–5.

Act [14] requires that national banks, regardless of ownership, have capital structures which are totally separate from and independent of those of other banks (see 12 U.S.C. 53), and which are subject to change only with the approval of the Comptroller. In contrast, all of the branches of a bank have but one capital structure. Each separately chartered bank affiliated with a holding company has its own deposits which are its sole liability, and from which it can make loans only to its own customers; whereas all the deposits of the branches of a single bank are pooled, and are available for investment or loan at the main office or at any other branch. The lending and borrowing limitations which the National Bank Act imposes upon separately chartered banks (12 U.S.C. 84, 82) are not applicable to branches of a single bank: the lending and borrowing limitations of each branch are the same as the total for all of the combined offices. While the assets of a branch may be freely transferred to the main office or to any other branch, the assets of a separately chartered bank may not be depleted or transferred to another bank owned by the same holding company.[15] In addition, the National Bank Act imposes substantial requirements upon separately chartered banks in regard to corporate organization, composition of boards of directors, man-

[14] Most State banking laws impose similar requirements on State-chartered banks.

[15] The Bank Holding Company Act prevents the mingling or pooling of assets of banks owned by a holding company with those of the holding company or its other subsidiaries. Sec. 6, 12 U.S.C. 1845.

agement, and termination of operations which are wholly absent in branch banking. 12 U.S.C. 71, 72, 93 (102 Cong. Rec. 6753–6754).

B. In the Banking Act of 1933, Congress chose to restrict branch banking for national banks to the geographic limits imposed upon state-chartered banks by state law. Section 23, 12 U.S.C. 36(c). In the very same Act, Congress imposed various obligations upon bank-holding companies; but it did not make the branch banking limitations applicable to them or to affiliated banks owned or controlled by them.[16] The Act adopted separate and mutually exclusive definitions of "branch" and "holding company affiliate," and the provisions applicable to one were inapplicable to the other. This Congressional decision to use differing regulatory schemes was made deliberately, because Congress thought the two kinds of banking "entirely different."[17]

Congress adopted the Bank Holding Company Act of 1956 as a comprehensive program for the regulation of bank-holding companies and the banks they owned. The premise of the legislation was that bank-holding companies are legitimate businesses which frequently provide valuable and beneficial service to the public, and should be subject only to that regulation necessary to prevent unfair competition and un-

[16] Sec. 13, 19, 20, 27 and 28, 12 U.S.C. 371c, 61, 377, 161, 481.

[17] 76 Cong. Rec. 1998. The statement was made by Senator Glass, the chief author and sponsor of the Act. 102 Cong. Rec. 6750; 77 Cong. Rec. 5863, 5892.

due concentration of banking activities.[18] Congress expressly rejected an effort to impose upon banks owned or controlled by bank-holding companies the geographic limitations against branch banking contained in the Banking Act of 1933. Although the House had passed a bill incorporating such a feature,[19] the Senate rejected that proposal on the ground that "A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate."[20] The Senate view prevailed and was embodied in the Bank Holding Company Act of 1956.

Thus Congress deliberately decided to subject separately chartered banks owned or controlled by bank-holding companies to a wholly different regulatory scheme from that imposed upon branches of a single bank. There is accordingly no warrant for the holding of the court of appeals in this case that such banks are subject to the territorial restrictions imposed upon branches of a single bank. Indeed, we know of no prior instance in which a separately chartered bank has been treated as a branch by any court or regulatory agency.[21]

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[18] 102 Cong. Rec. 6750. Accord: Sen. Rep. 1095, 84th Cong., 1st Sess.

[19] 101 Cong. Rec. 8187.

[20] 102 Cong. Rec. 6753; see, also, Sen. Rept. 1095, 84th Cong., 1st Sess., p. 11, and 102 Cong. Rec. 6753–6754.

[21] In *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (C.A. 9)—a case which we believe is on its facts, irreconcilable with the decision below—the Ninth Circuit indicated in dictum that there might be circumstances in which a subsidiary of a bank holding company would be

C. The holding that a separately chartered and incorporated bank may be treated as a branch will have a broad and continuing impact upon the regulation of the banking industry and, perforce, the industry itself. Because proceedings for direct review of all Federal Reserve Board decisions under the Bank Holding Company Act (like suits brought against the Comptroller) may be brought in the District of Columbia Circuit,[22] the decision on the merits has nationwide application. It is clearly applicable to any instance in which an existing bank wishes to expand its operations by establishing a new holding company which is in turn to acquire a new or existing bank in any of the 34 States which limit branch banking. Beyond this, the rationale of the decision casts doubt upon any further growth of existing bank-holding companies, either through creation of new subsidiaries or through the purchase of existing banks, unless the requirements imposed upon branch banking are satisfied by the new subsidiary. The necessary result will be to encourage expansion through the use of affiliate banks, which are largely unregulated, rather than

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treated as a branch. 306 F. 2d at 943. However, the formation and acquisition of the new bank in that case took place prior to the effective date of the Bank Holding Company Act of 1956, the regulatory provisions of which made plain the contrary intent of Congress. See *supra*, pp. 20–21.

[22] Section 9 of the Act, 12 U.S.C. 1848, permits any party aggrieved by a Board order to institute proceedings for review of the order either in the circuit in which the party has its principal place of business or in the District of Columbia Circuit.

under the system of regulation established by the Bank Holding Company Act of 1956. The broad implications of the decision, made in apparent disregard of the Congressional scheme, make it important that the issue be definitively resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

JANUARY 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

FURTHER ORDERED by this Court that appellees recover from appellant their taxable costs on appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER.

Dated: AUGUST 14 1963.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

No. 17,681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and McGOWAN, Circuit Judges, in Chambers.

Order

On consideration of the petition of appellant in case No. 17,672 for rehearing *en banc*, of the petition of appellant in case No. 17,681 for rehearing en banc, and of the answer thereto filed by appellee Banks, and on consideration of the motion of appellant in case No. 17,681 for leave to file a supplemental memorandum in support of the petition for rehearing *en banc*, and of the objection thereto filed by appellee Banks, and on consideration of the motion of appellee Banks for leave to file a supplemental appendix to

their reply to appellant's petition for rehearing in case No. 17,681, it is

ORDERED by the court that: (1) Appellant's motion for leave to file a supplemental memorandum in support of the petition for rehearing *en banc* in case No. 17,681 is hereby denied; (2) The motion of appellee Banks for leave to file supplemental appendix to their reply to appellant's petition for rehearing *en banc* in case No. 17,681 is hereby granted; and (3) Appellants' aforesaid petitions for rehearing *en banc* are hereby denied.

Per Curiam.

Dated: OCT 17 1963.

Circuit Judges WRIGHT and MCGOWAN did not participate in the foregoing order.

APPENDIX B

1. The National Bank Act provides in pertinent part:

R.S. § 5136, as amended, 12 U.S.C. 24:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate * * *

* * * * *

R.S. § 5168, 12 U.S.C. 26:

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

R.S. § 5169, 12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

2. The Banking Act of 1933 (Act of June 16, 1933, 48 Stat. 189) provides in pertinent part:

Section 23, as amended, 12 U.S.C. 36:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation

are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. * * *

* * * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

* * * * *

3. The Bank Holding Company Act of 1956 (Act of May 9, 1956, 70 Stat. 133), provides in pertinent part:

Section 2, 12 U.S.C. 1841:

(a) "Bank holding company" means any company (1) which directly or indirectly owns,

controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. * * *

* * * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

* * * * *

Section 3, 12 U.S.C. 1842:

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such

bank; (3) for any bank holding company or sudsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. * * *

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

* * * * *

Section 6, 12 U.S.C. 1845:

(a) From and after the date of enactment of this Act, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of

a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however,* That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Section 7, 12 U.S.C. 1846:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiares thereof.

* * * * *

Section 9, 12 U.S.C. 1848:

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the

court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

4. Louisiana Act No. 275 of 1962, § 3, provides in pertinent part:

> It shall be unlawful:
>
> (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter.
>
> (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;
>
> (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or
>
> * * * * *
>
> (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing; this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.